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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

APR 23 1997

Federal Communications Commission
 Office of Secretary

In the Matter of)
)
 Application by SBC Communications Inc.)
 Southwestern Bell Telephone Company,) CC Docket No. 97-121
 and Southwestern Bell Communications)
 Services, Inc. d/b/a Southwestern Bell)
 Long Distance for Provision of In-Region)
 InterLATA Services in Oklahoma)

**MOTION TO DISMISS AND REQUEST
 FOR SANCTIONS BY THE ASSOCIATION
FOR LOCAL TELECOMMUNICATIONS SERVICES**

Pursuant to Rule 1.727(a) of the Commission's Rules of Practice, the Association for Local Telecommunications Services ("ALTS")¹ hereby moves to dismiss immediately the application of Southwestern Bell ("SBC") for in-region long distance authority in Oklahoma because it fails to establish the factual foundation required for a Section 271 filing.² Because SBC either was or should have been aware its application lacked the required factual basis at the time it was filed, its filing rises to the level of a misrepresentation to the Commission. Accordingly, ALTS also requests that sanctions be imposed.

SBC asserts it can file for authority under Section 271(c)(1)(A) ("Track A"), which requires that competitive service

¹ ALTS is the national trade association for more than thirty facilities-based local exchange competitors.

² Rule 1.727(a) addresses motions in the analogous context of formal complaint proceedings. The Commission has not issued rules of procedure applicable to Section 271 applications.

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be provided to residential customers, because Brooks Fiber Properties ("Brooks") supposedly offers residential service in Oklahoma (Brief at ii). However -- as Brooks informed SBC in writing seven weeks ago -- Brooks has not offered and is not offering any residential service in Oklahoma (Attachment A).

SBC also claims it is entitled to file for authority under Section 271(c)(1)(B) ("Track B"). However, the statutory language creating the Track B option expressly prohibits any Track B filings after interconnection requests have been filed except for two narrow exceptions not involved here. Because interconnection requests have been filed in Oklahoma, as SBC acknowledges, SBC cannot pursue a Track B application in Oklahoma at the present time.³

I. SBC CANNOT FILE A TRACK A APPLICATION FOR OKLAHOMA BECAUSE BROOKS IS NOT PROVIDING RESIDENTIAL SERVICE IN THAT STATE.

An RBOC applying for in-region authority under Track A must show it has implemented one or more interconnection agreements with new entrants serving business and residential customers predominantly over their own facilities (§ 271(c)(1)(A)). SBC claims that "Brooks Fiber is a qualifying carrier under subsection 271(c)(1)(A)" because "Brooks Fiber ... offers service to residential customers ..." (Brief at 11).

³ This motion is expressly limited to the issue of whether SBC can even file a Section 271 application in the absence of any provisioning of competitive residential service in Oklahoma. ALTS makes no concession concerning other defects in SBC's application by not addressing them at this time.

SBC is dead wrong. As stated in the attached affidavit of Mr. John C. Shapleigh, Executive Vice President-Regulatory and Corporate Development, Brooks Fiber Properties: "Brooks is not now offering residential service in Oklahoma, nor has it ever offered residential service in Oklahoma" (Shapleigh affidavit at ¶ 3). Indeed, Brooks' only current activity in Oklahoma relating to residential markets involves a test of four circuits provisioned to the homes of Brooks employees via SBC resale (id. at ¶ 5).⁴

SBC does not have any excuse for its error. On February 7, 1997, SBC wrote to Brooks seeking "certain information regarding Brooks' operations in Oklahoma in connection with an anticipated application by SWBT to the FCC under Section 271 ..." (Letter from Martin E. Grambow, Vice President and General Counsel, SBC, dated February 7, 1997). Brooks wrote back on March 4th informing SBC that: "Brooks has not presently commenced a general offering of local telephone exchange service to residential customers" (Attachment A). Indeed, SBC appears aware in its Brief that its application rests only on the Brooks test, and not upon any operational provisioning of residential service, because SBC states that: "as of mid-March 1997, [Brooks] actually served

⁴ The legislative history of Section 271 confirms that a test is not sufficient to meet Track A's requirements. The House Committee on Commerce explained concerning the provision which ultimately came Section 271: "The Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service somewhere in the State ..."; H.R. Rep. No. 104-102 at 77; emphasis supplied.

residential customers only through resale;" (Brief at 11; emphasis supplied).

Because SBC cannot show the existence of a new entrant providing service to residential customers, a prerequisite for a Track A filing, SBC's application should be dismissed.

**II. SBC CANNOT PURSUE A TRACK B FILING IN OKLAHOMA WHILE
INTERCONNECTION ARRANGEMENTS ARE STILL BEING IMPLEMENTED.**

SBC claims its application also can be considered under an alternative path known as "Track B." This permits an RBOC to file a "statement of generally available terms" (an "SGAT") complying with the competitive checklist if, ten months after the date of enactment of the 1996 Act, no competitive provider "has requested the access and interconnection described in [Track A] before the date which is 3 months before the date the company makes its application." (§ 271(c)(1)(B)). Because interconnection requests have been filed in Oklahoma, SBC is prohibited by the clear language of the statute from proceeding under Track B.

Other portions of the statute confirm this prohibition. Track B identifies two situations in which an RBOC "shall be considered not to have received any request for access and interconnection:" (1) when a state commission certifies that a new entrant has not bargained in good faith; and (2) when a state commission determines a new entrant has violated the implementation schedule for an agreement (see the last sentence

of Section 271(c)(1)(B)). These two exceptions demonstrate Congress was alert to the possibility the Track B option might be unfairly denied to a RBOC, and addressed the problem directly. In particular, the second caveat created by Congress -- unreasonable violation of an implementation schedule by a new entrant -- plainly demonstrates that an interconnection request moving ahead on its predetermined implementation schedules precludes any Track B option, since otherwise the caveat would make no sense.⁵

Even if the statute were less clear concerning the disabling effect of interconnection requests on Track B, there is also legislative history and compelling policy reasons why the Commission should not allow any Track B application to proceed during the period before interconnection requests have been fully

⁵ The possibility no new entrants may meet all the Track A criteria even after their interconnection requests have been fully implemented in no way alters this analysis. First, as noted above, Congress has already addressed any "unfairness" resulting from the disabling of Track B during the pendency of facilities-based interconnection requests by creating two express limitations on that disabling effect. These carefully tailored statutory solutions plainly preclude the creation of additional "equitable" limitations concerning the disabling effect of interconnection requests on the Track B option.

Second, even if the Commission had the power to revive the Track B option if it became clear that interconnection requests in a particular state could not result in qualifying Track A new entrants -- a power which ALTS respectfully insists does not exist -- such a power could only be exercised at a time and upon a record clearly showing that implementation of pending interconnection requests will not result in qualified Track A new entrants. Because implementation efforts are just starting in Oklahoma, it would clearly be premature to conclude now that the Track A process, Congress' preferred mechanism for enabling sustainable local competition, will not work there.

implemented. The legislative history of the 1996 Act clearly shows that Track A is Congress' preferred mechanism for in-region RBOC entry, a preference grounded on Congress' well-founded belief that it provides a better test of whether local barriers have been removed than does Track B. Accordingly, the Commission needs to prevent RBOCs from substituting Track B for Track A compliance.

The House of Representatives created the statutory provision which ultimately became Track A. The approach adopted by the House -- operational implementation of interconnection agreements -- was very different from the mere statements of "openness and availability" that would function as the basic interconnection requirement under other portions of the House bill.⁶ According to the House Commerce Committee Report, it decided to take this different approach because the "openness and accessibility" requirements of the House bill, which the ILECs would have discharged through statements resembling tariffs, "are truly validated only when an entity offers a competitive local service in reliance on those requirements" (H.R. Rep. No. 104-204 at 76-77):

"... the Commission must determine that there is a facilities-based competitor that is providing service to

⁶ The Conference Committee subsequently decided to impose interconnection obligations on the ILECs via agreements instead of statements, but this change does not alter the legal significance of the House's original decision to craft an entirely new and significantly more demanding approach for RBOC in-region long distance entry -- Track A.

residential and business subscribers. This is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition. In the Committee's view, the 'openness and accessibility' requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements." (Emphasis supplied.)

The Conference Committee expressly adopted the House's approach to RBOC in-region long distance entry in current Section 271 (see H.R. Conf. Rep. No. 104-458, at 147: "This test that the conference agreement adopts comes virtually verbatim from the House amendment").

Congress' preference for Track A compliance reflects the obvious and palpable difference between a mere statement by an RBOC that it is willing to remove entry barriers, and a competitor's provisioning of services based on actual removal. The first is only an ill-defined promise that could be easily dodged by an RBOC once it had received its Section 271 authority. The second is a real event which: (1) provides a more robust comparison to the statutory standard than a speculative paper promise; and (2) is much more resistant to post-approval sabotage than simple promises, which are readily susceptible to gaming via "technical disputes" and "implementation difficulties." Because of these important distinctions, Congress made operational implementation of competitive local services the preferred approach to RBOC long distance entry, and Track B -- the publication of an SGAT -- the exception.

Based upon the statutory language of Section 271(c) (1) (B),

and the clear policy preferences of Congress, SBC should not be allowed to file a Track B application for Oklahoma.⁷

III. SANCTIONS SHOULD BE IMPOSED ON SBC FOR FILING AN APPLICATION UNSUPPORTED BY THE NECESSARY FACTS.

It may seem puzzling that such a sophisticated and well financed a company as SBC would incur the immense time and resources needed in order to file its Section 271 application for Oklahoma, yet mishandle one critical, simple fact -- the absence of competitive residential service. But this "mistake" would be well understood by any farmer who has ever managed to sell a poor horse by putting an even sorrier animal next to him. The RBOCs are plainly hoping they can make inadequate applications seem almost meritorious if they are allowed to start off with applications that are not even in the ball park.⁸

⁷ See also the decision of OCC ALJ Goldfield in Cause No. PUD 970000064, transcript of proceedings dated April 21, 1997, at 94, lines 1-3: "Southwestern Bell cannot proceed under Section 271(c)(1)(B). I want to make that clear that in my opinion they can only proceed under 'A'; and the Comments of the Oklahoma Attorney General filed March 11, 1997, in the same docket.

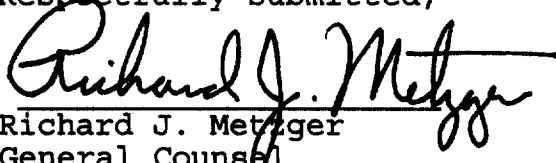
⁸ SBC's willingness to misrepresent the facts in its brief is further underscored when it asserts that: "Brooks Fiber not only 'offer[s]' service over its own network - thereby fulfilling this requirement - but actually furnishes service to customers exclusively over that network. Brooks Fiber OCC Comments at 2" (SBC Brief at 10; emphasis in original). Page 2 of Brooks' OCC Comments are appended as Attachment B for reference. This page contains four different references to the "leased SWBT dedicated T-1 facilities" and "resold SWBT ISDN service" being using by Brooks, and reveals that more customers are served through SBC resale than through Brooks' own facilities. SBC's reliance on this page to support its claim that Brooks serves customers "exclusively" over its own network cannot be defended, particularly given its awareness of the importance of this factual point.

Unless the Commission imposes sanctions here, SBC's filing of a Section 271 application that is so patently defective will encourage other RBOCs to join in a "Section 271 lottery," a contest in which RBOCs would compete to see who could first sneak a flawed application through an over burdened process. The Commission has already warned against such filings in general, noting that: "A pleading may be deemed frivolous under 47 C.F.R. § 1.52 if there is no 'good ground to support it'"⁹ The Commission needs to take prompt action here to defend the integrity of the Section 271 process from calculated and unfounded exploitation by the RBOCs.

CONCLUSION

For the foregoing reasons, ALTS requests that the Commission enter an order dismissing SBC's Section 271 application for Oklahoma, and imposing sanctions on SBC.

Respectfully submitted,

By: 
Richard J. Metzger
General Counsel
Association for Local
Telecommunications Services
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 466-3046

April 23, 1997

⁹ Commission Taking Tough Measure Against Frivolous Pleadings, 11 FCC Rcd 3030 (1996): sanctions for frivolous pleading include issuance of forfeitures under 47 U.S.C. § 503. See also Amendment of the Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-238, NPRM issued November 27, 1996, at ¶ 85.

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Services, Inc., d/b/a Southwestern Bell
Long Distance for Provision of In-Region,
InterLATA Services in Oklahoma

CC Docket No. 97-121

AFFIDAVIT OF JOHN C. SHAPLEIGH

JOHN C. SHAPLEIGH, being duly sworn, deposes and says:

1. My name is John C. Shapleigh. I am Executive Vice President - Regulatory and Corporate Development, Brooks Fiber Properties, Inc. (Brooks). My business address is 425 Woods Mill Road South, Suite 300, Town and Country, Missouri 63017.
2. I am a senior executive officer of Brooks with general management responsibility for directing all corporate development and regulatory matters for Brooks and its operating subsidiaries, including within the State of Oklahoma. In that capacity I have knowledge of the facts concerning the status of Brooks' operations in Oklahoma.
3. Brooks is not now offering residential service in Oklahoma, nor has it ever offered residential service in Oklahoma. Brooks' local exchange tariffs in Oklahoma clearly state that the furnishing of service is "...subject to the availability on a continuing basis of all the necessary facilities..." (Section 2.1.2.2). Because necessary facilities are not yet available, as I discuss below, Brooks is not accepting any request in Oklahoma for residential service.
4. SBC was informed of the fact that Brooks does not yet offer residential service in Oklahoma in a letter dated March 4, 1997, responding to SBC's request for information about Brooks' operations "in connection with an anticipated Application by SWBT to the FCC under Section 271..."
5. Brooks is currently testing resale systems offered by SBC by running test circuits into the homes of four Brooks employees in Oklahoma. These tests permit Brooks to study the actual processes associated with provisioning resold SBC service, such as billing accuracy and Directory Assistance. The employees involved do not pay for the test circuit "service", and this test is in no way a general offering of residential service. Brooks has made no decision yet as to the timing of an offering of residential service in Oklahoma.

6. Facilities are currently unavailable to Brooks in Oklahoma for provisioning residential service because: (1) unbundled loops cannot be utilized prior to completion of collocation arrangements and establishment of final pricing rules for unbundled loops at reasonable rates; and (2) Brooks has not gained enough experience with SBC's resale systems to determine whether Brooks can effectively use them on even an ancillary basis.

7. This concludes my statement.

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

VERIFICATION

I, JOHN C. SHAPLEIGH, first being duly sworn, states on my oath that I am Executive Vice President - Regulatory and Corporate Development, Brooks Fiber Properties, Inc. (Brooks). I am authorized to act on behalf of Brooks regarding the foregoing statement. I have read the aforesaid statement and I am informed and believe that the matters contained therein are true and correct to the best of my knowledge.

Dated: *April 21, 1997*


JOHN C. SHAPLEIGH

JOHN C. SHAPLEIGH appeared, and being first duly sworn upon his oath stated that he is the Executive Vice President - Regulatory and Corporate Development, Brooks Fiber Properties, Inc. (Brooks), that he signed the foregoing document in that capacity and the facts contained therein are true and correct according to the best of his knowledge.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal in the aforesaid County and State on the above date.

Dated: *April 21, 1997*


NOTARY PUBLIC

My Appointment Expires: *Oct 11, 1999*



March 4, 1997

Martin E. Grambow
Vice President and General Counsel
SBC Telecommunications, Inc.,
1401 I Street, N.W., Suite 1100
Washington, D.C. 20006

RE: SWBT Request for Information to Brooks

Dear Martin:

This responds to your letter of February 7 in which you requested certain information regarding Brooks' operations in Oklahoma in connection with an anticipated Application by SWBT to the FCC under Section 271 of the Telecommunications Act of 1996. Responses to the specific questions posed in your letter are contained in Attachment A which is attached hereto.

If you have any additional questions concerning these matters, please feel free to contact me at (314) 579-4637.

Very truly yours,

A handwritten signature in cursive script that reads "Edward J. Cadieux".

Edward J. Cadieux
Director, Regulatory Affairs - Central Region

cc: John C. Shapleigh

ATTACHMENT A

1. Does Brooks presently provide local telephone exchange services to business customers in Tulsa and/or Oklahoma City? When did Brooks begin providing such service?

A: Brooks only very recently completed interconnection of its Tulsa and Oklahoma City networks with SWBT's networks and, thus, Brooks' provision of local exchange service in Oklahoma has just commenced. Brooks is currently providing local telephone exchange service to two (2) business customers in Tulsa and to five (5) business customers in Oklahoma City. Brooks commenced provision of local exchange service in Tulsa and Oklahoma City in January, 1997.

2. Does Brooks presently provide local telephone exchange service to residential customers in Tulsa and/or Oklahoma City? When did Brooks begin providing such service?

A: Brooks presently is providing local telephone service to three (3) residential customers, on a test basis, through resale of SWBT's service in Tulsa, and one (1) residential customer, on a test basis, through resale of SWBT's service in Oklahoma City. Brooks has not presently commenced a general offering of local telephone exchange service to residential customers in Tulsa or Oklahoma City. The above-described provision of residential service on a test basis was commenced in January, 1997.

3. Does Brooks presently provide local exchange telephone service to any business customers in Oklahoma exclusively or predominantly over its own telephone exchange service facilities? When did Brooks begin providing such service?

A: The two (2) business customers in Tulsa and the five (5) business customers in Oklahoma City presently being served by Brooks are "on-net" customers -- i.e., they are directly connected to Brooks fiber optic transmission network, with dial tone provided by Brooks' switches in the respective cities. However, it is important to note that Brooks anticipates serving most business customers by leasing SWBT unbundled loops which will be connected to the Brooks network at collocations in SWBT central offices. Brooks' ability to provide service in this manner -- i.e., by making substantial use of SWBT loop facilities -- is dependent upon completion of make-ready construction by

SWBT in the affected central offices and Brooks' installation of equipment in the collocation spaces therein. Brooks has filed and SWBT is presently processing applications for collocations in 5 central offices in Tulsa and in 8 central offices in Oklahoma City. To date none of these collocations is operational (other than pre-existing virtual collocations in one central each in Tulsa and Oklahoma City) and, as a result, Brooks' commencement of service through unbundled loops in Oklahoma has been delayed. While SWBT has recently taken certain steps to accelerate the remaining process for completion of some of these collocations, it is Brooks' opinion that completion of the collocations has taken much longer than reasonably necessary and that the associated delays have occurred in large part due to the cumbersome collocation process followed by, and matters otherwise within the control of, SWBT. Additionally, Brooks would note that the current unbundled loop rates of \$17.63 as contained in the Brooks-SWBT negotiated interconnection agreement for Oklahoma are not supported by any cost determination of the Oklahoma Corporation Commission and, therefore, are not proven to be cost-based.

4. Does Brooks presently provide local exchange telephone service to any residential customers in Oklahoma exclusively or predominantly over its own telephone exchange service facilities? When did Brooks begin providing such service?

A: Brooks presently is providing local telephone service to three (3) residential customers, on a test basis, in Tulsa, and one (1) residential customer, on a test basis, in Oklahoma City. For each of these test-basis customers, service is being provided through resale of SWBT's local exchange service (i.e., SWBT is providing dial tone). The above-described provision of residential service on a test basis was commenced in January, 1997.

5. Does Brooks presently provide local exchange telephone service to any business customers in Oklahoma through resale of SWBT's local service? When did Brooks begin providing such service?

A: No.

6. Does Brooks presently provide local exchange service to any residential customers in Oklahoma through resale of SWBT's local service? When did Brooks begin providing such service?

A: See responses to Questions Nos. 2 and 4, above.

7. Please confirm whether the following quotes contained in the February 6, 1997 article in the Daily Oklahoman, entitled "Local Phone competition Just Budding" are accurate:

- a. Brooks has begun "providing local phone service in parts of Oklahoma City and Tulsa metropolitan areas, Senior Vice President Waymon Tipton said Wednesday."

- b. "Tipton said although Brooks has begun providing local service in Oklahoma City and Tulsa, it has not launched a major marketing effort yet."

A: While Brooks cannot confirm that the quotes are verbatim, they are substantively accurate, and are reflective of the same factual information as contained in the responses to Questions Nos. 1-6 above.

ATTACHMENT B
Page 2 of Brooks' OCC Comments

Brooks provides telecommunications services through SONET-based fiber optic transmission systems tied into a digital host switch. Currently Brooks' Oklahoma networks consist of a 221 mile transmission system in Tulsa, and a 44 mile system in Oklahoma City. Brooks has deployed one Lucent 5ESS digital host switch each in its Tulsa and Oklahoma City networks, and those switches became operational in January, 1997.²

Brooks has a signed, Commission-approved interconnection agreement with SWBT covering operations in Oklahoma. The interconnection agreement was executed on August 29, 1996 and approved by the Commission by its orders dated October 2, 1996. Shortly after signing the interconnection agreement, Brooks began the process of working with SWBT to implement the physical interconnection of networks (trunking) and other processes necessary for the passage of traffic between Brooks and SWBT. That initial interconnection process was completed in January, 1997, when Brooks and SWBT began exchanging "live" traffic.

Brooks commenced offering switched local exchange services to its first group of customers in January, 1997, once its Oklahoma switches became operational and initial network interconnection and associated systems were implemented with SWBT. At this early stage, Brooks Oklahoma operations are limited - Brooks is currently providing switched local exchange service to 13 business customers in Oklahoma City (6 via direct on-net connections to Brooks' fiber optic transmission rings, 6 through leased SWBT dedicated T-1 facilities and 1 through resold SWBT ISDN service), and to 7 business customers in Tulsa (2 via direct on-net connections to Brooks fiber optic transmission rings and 5 through leased SWBT dedicated T-1 facilities) and to 3 residential customers in Tulsa and 1 residential customer in Oklahoma City (all through resale of SWBT's local exchange service, and all currently on a test-basis). As explained further below, Brooks' expansion of service to a significant number of customers depends upon its ability to gain access to and utilize leased unbundled loop facilities of SWBT, a prerequisite for which is completion of physical collocations at various SWBT central offices.

To provide context to the discussion of Brooks' current status and plans for operations in Oklahoma, it is important to understand the several potential methods available to a CLEC for offering originating service to customers. Generally, there are three primary methods: (a) on-net origination (i.e., where customers directly connect to the transmission facilities of the CLEC; (b) use of incumbent LEC unbundled network elements (including unbundled loops) in combination with the CLEC's transmission facilities; and (c) resale of the incumbent CLEC's services (i.e., where dial-tone is provided by the incumbent CLEC).

With respect to on-net origination, it is important to recognize that the fiber optic networks of CLEC's like Brooks do not approach the originating reach of the pre-existing, ubiquitous loop/switching/interoffice transmission networks of the incumbent local exchange carriers, which have been deployed in the past under the protective environment of a sanctioned monopoly. While Brooks has been expanding its fiber optic networks across the country and will continually evaluate the economic feasibility of further expansion, there is no realistic scenario under which the network of a fiber optic ring-based CLEC like Brooks will - in and of itself -- approach the ubiquitous originating reach of SWBT's network. This fact has enormous

² Brooks also plans to deploy remote switches in a number of the physical collocations which are currently under construction at SWBT central offices in Oklahoma City and Tulsa.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss by the Association for Local Telecommunications Services was served April 23, 1997, on the following persons by first-class mail or hand service as indicted.


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